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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 RAY MARTIN,
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11 Plaintiff,
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13 v.
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15 HAPO COMMUNITY CREDIT UNION,
16 a Washington Corporation,
17 RANDY LUCHSINGER, and JANE
18 DOE LUCHSINGER, DAVID SCHULTZ
19 AND JANE DOE SCHULTZ,
20

21 Defendants.
22

23 NO. CV-04-5109-EFS
24

25 **ORDER HOLDING IN ABEYANCE IN
26 PART AND GRANTING IN PART
DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER.**

27
28 Before the Court is Defendants' Motion for a Protective Order. (Ct.
29 Rec. 24.) Defendants Motion seeks orders: (1) barring any further
30 electronic discovery and (2) requiring plaintiffs to finance any further
31 electronic discovery, if any. The Court has reviewed the parties'
32 memoranda and supporting attachments and is fully informed. For the
33 reasons stated herein, Defendants' Motion for a Protective Order is held
34 in abeyance in part and granted in part.
35

36 **I. BACKGROUND**
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38 Defendant HAPO Community Credit Union ("HAPO"), Randy Luchsinger and
39 David Schultz filed a Motion for a Protective Order to prohibit Mr.
40 Martin from seeking any future electronic discovery. (In addition, HAPO
41

1 filed a substantially similar Motion for Protective Order in the cases
2 of Rita Dowell (CV-04-5098-EFS) and Danny Mac (CV-04-5110-EFS)). Mr.
3 Martin filed suit on October 4, 2004, against HAPO, Randy Luchsinger, and
4 David Schultz alleging racial discrimination. (Ct. Rec. 1.) It is the
5 Court's understanding Plaintiffs in all three cases consolidated their
6 electronic discovery issues and Plaintiffs paid \$10,000 to preserve a
7 copy of HAPO's hard drive. (CV-04-5098-EFS Ct. Rec. 46-2 at 35.)

8 Plaintiffs requested discovery of files contained on HAPO hard
9 drives relating to Ms. Dowell's employment discrimination claim. On April
10 11, 2005, the Court signed a Stipulated Order Regarding Protocol for
11 Electronic Discovery. (CV-04-5098-EFS Ct. Rec. 42.) All parties
12 compromised to establish a workable electronic discovery plan using
13 "keyword" searches of HAPO's hard drive. The parties trimmed Plaintiffs'
14 original request from 164 search terms to fifty (50) words. (CV-04-5098-
15 EFS Ct. Rec. 30)

16 On May 1, 2005, HAPO's computer search expert, Mr. Gordon Mitchell,
17 conducted a search of HAPO's hard drive. (CV-04-5098-EFS Ct. Rec. 76-2.)
18 As stated in the Stipulated Electronic Discovery Protocol, the parties
19 agreed that keywords producing more than 500 hits would not be evaluated.
20 (CV-04-5098-EFS Ct. Rec. 42.) Of the fifty search terms, thirty-three had
21 hits. (CV-04-5098-EFS Ct. Rec. 76-2.) However two words, "tournament" and
22 "golf" were estimated to produce over 500 hits. Mr. Mitchell turned over
23 2300 documents to defense counsel for these thirty-three search terms.
24 (CV-04-5098-EFS Ct. Rec. 76-2.) On June 10, 2005, Defense counsel turned
25 over 1100 pages corresponding to thirteen search terms to Plaintiffs.
26 (CV-04-5098-EFS Ct. Rec. 76-2.) Defendants anticipate Plaintiffs will

1 seek further electronic discovery and are especially weary of Plaintiffs'
2 continuing suggestions that HAPO turn over the hard drive to Plaintiffs'
3 expert. Accordingly, Defendants seek a protective order to prohibit
4 Plaintiffs from seeking further electronic discovery.

5 **1. Further Electronic Discovery**

6 Under the Federal Rules of Civil Procedure, the Court may issue a
7 protective order for "good cause shown," to protect a person or party
8 from "annoyance, embarrassment, oppression, or undue burden or expense,"
9 when justice so requires. Fed. R. Civ. P. 26(c). The Defendants argue
10 further electronic discovery will present HAPO with an undue burden. When
11 determining whether "good cause" exists for a protective order, a court
12 must balance the need for discovery against the burdens such discovery
13 places on the parties. See *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir.
14 1981). The requesting party bears the burden of demonstrating to the
15 Court the specific harm that will occur if discovery is not limited.
16 *Phillips v. Gen. Motors*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).

17 Typically, the party seeking discovery is not allowed free access
18 to the opposing party's hard drive. See *In re Ford Motor Co.*, 345 F.3d
19 1315, 1317 (11th Cir. 2003). Such a process might allow the opposing
20 party to have access to trade secrets and privileged attorney client
21 information. Accordingly, Plaintiffs' expert shall not have access to
22 Defendants' hard drive absent a showing of evidence necessitating such
23 access.

24 In the case at hand, Defendants worked with Plaintiffs to
25 substantially produce the results contemplated by the Stipulated
26 Electronic Discovery Protocol. The parties agreed on a targeted keyword

1 search to both increase the chance of finding responsive documents and
2 decrease the Defendants' burden associated with producing such documents.

3 The Defendants have already produced 1100 electronic discovery
4 documents at a cost of \$23,000. (Ct. Rec. 63 at 12.) Additionally,
5 counsel for Defendants spent a significant amount of time preparing for
6 the search and drafting the Stipulated Electronic Discovery Protocol.
7 (Ct. Rec. 63 at 12.) Consequently, the Court finds Defendants have shown
8 "good cause" regarding the undue burden associated with further
9 electronic discovery.

10 However, the Court's order prohibiting further electronic discovery
11 is contingent on the conditions described below. First, the Court orders
12 Defendants to file a declaration explaining why the words "tournament"
13 and "golf" were stopped before 500 "hits" were reached. In addition,
14 Defendants are ordered to explain why they used an "individual hit"
15 method (rather than a "hits in document" method) in estimating whether
16 a word received 500 hits. Although the Stipulated Electronic Discovery
17 Protocol mandates that only words receiving less than 500 "hits" be
18 produced, it appears that there is some confusion over the word "hits."
19 For example, Mr. Mitchell stated he stopped the search for the word
20 "tournament" because there were 400 documents averaging two or more hits
21 each, thus providing an estimate of 800 hits. (CV-04-5098-EFS Ct. Rec.
22 67-2.) Such a procedure for examining hits would allow one document with
23 the word tournament repeated several times over to influence the total
24 hit count, even though only one document need be examined. Mr. Richard
25 Haugen, Plaintiffs' expert, describes this discrepancy between
26 "individual hits" and "hits within a document" in his declaration. (CV-

1 04-5098-EFS Ct. Rec. 75 at 2).

2 The Court also orders Defendants to produce a list of documents
3 turned over by Mr. Mitchell to Defense Counsel by file-name only. Any
4 documents where the file-name itself is subject to some privilege (work-
5 product, attorney client, etc.) are exempt from this requirement.
6 Assuming Defendants meet both requirements, the Court will grant the
7 Defendants' Motion for a Protective Order Prohibiting Further Electronic
8 Discovery. However, Plaintiffs may renew the request for electronic
9 discovery upon a showing of new evidence that additional electronic
10 discovery is likely to produce discoverable information. Such a request
11 will be subject to the order on cost-sharing described below.

12 **2. Cost-Sharing**

13 Because of the difficulty in extracting and searching for electronic
14 discovery, courts have developed a framework to evaluate which party must
15 bear the financial burden of electronic discovery. See e.g. *Zubalake v.*
16 *UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment Inc.*
17 *v. the William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002).
18 *Zubalake* modified the framework set forth in *William Morris*, resulting
19 in the following eight-factor test:

20 1. The extent to which the request is specifically tailored
21 to discover relevant information;

22 2. The availability of such information from other sources;

23 3. The total cost of production, compared to the amount in
24 controversy;

25 4. The total cost of production, compared to the resources
26 available to each party;

26 5. The relative ability of each party to control costs and
its incentive to do so;

1 6. The importance of the issues at stake in the litigation;
2 and
3 7. The relative benefits to the parties of obtaining the
information.

4 *Zubalake*, 217 F.R.D. at 322.

5 According to the court in *Zubalake*, the first two factors are the
6 most important. *Id.* at 323. In addition, the court held that cost
7 shifting should occur in cases where the information is on a difficult
8 to retrieve medium, such as back-up tapes, or where fragmented files must
9 be searched. *Id.* at 324.

10 In the instant case, the first factor weighs in Defendants' favor.
11 The parties have already formed an agreement specifically tailored to
12 discover relevant information and limited so as to not be unduly
13 burdensome. The information resulting from this search has been produced
14 to Plaintiffs. The second factor is a toss up because Plaintiffs can
15 depose employees to ask if certain files are on their hard drive or
16 inbox, but such requests might not be effective for documents produced
17 years ago. So far, total discovery costs are \$33,000; Defendants have
18 spent \$23,000 on an expert to conduct discovery, and Plaintiffs have
19 spent \$10,000 to preserve the contents of HAPO's hard drive. It follows
20 that a significant amount of money has been spent on discovery by
21 Defendants to date, and the third and fourth factors weigh in the
22 Defendants favor. Finally, Plaintiffs are likely the only party to
23 benefit from conducting a further search. The Court finds that the
24 majority of the factors weigh towards requiring Plaintiffs to pay for
25 electronic discovery requests.

26 A multi-factor analysis indicates that Plaintiffs should finance an

1 future discovery. This is especially true given that Plaintiffs wish to
2 search back-up tapes and for fragmented documents, two of the key
3 instances in which the court in Zubalake felt cost-shifting to be
4 necessary. Accordingly, the Court grants Defendants' Motion for a
5 Protective Order requiring Plaintiffs' to bear the cost of future
6 electronic discovery, thus if Plaintiffs meet the standard prescribed
7 above for future electronic discovery, the Court orders Plaintiffs to
8 finance such discovery.

9 Accordingly, **IT IS HEREBY ORDERED:** Defendants' Motion for a
10 Protective Order, (**Ct. Rec. 24**), is **HELD IN ABEYANCE IN PART AND GRANTED**
11 **IN PART**, Specifically,

12 1. Defendants' Motion for a Protective Order Barring any Future
13 Electronic Discovery is **HELD IN ABEYANCE** until Defendants:

14 a. File a Declaration with the Court explaining why searches
15 for the words "golf" and "tournament" were stopped prior to reaching 500
16 hits, and explaining why the "individual hits" instead of the "hits
17 within a document" definition of hits was used to exclude these search
18 terms; and

19 b. Produce to Plaintiffs a list of all documents receiving hits
20 in Mr. Mitchell's May 1, 2005, search. After such production, the Court
21 will **GRANT** Defendants' Motion for a Protective Order Barring any Future
22 Electronic Discovery. However, Plaintiffs may seek future discovery upon
23 a showing that new evidence indicates future discover is likely to lead
24 to discoverable information.

25 2. Defendants' Motion for a Protective Order Requiring Plaintiffs
26 to Bear the Entire Cost of Further Electronic Discovery, if any, is

GRANTED. Therefore, Plaintiffs may seek further electronic discovery if (1) Plaintiffs make a showing that new evidence indicates future discovery is likely to lead to discoverable information, and (2) Plaintiffs finance such discovery.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order; and provide copies to all counsel.

DATED this 6th day of September 2005.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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